

9/28/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
Flexabar Corporation,)	Docket No. IF&R 456-C
)	
Respondent)	

ORDER ON ISSUE OF LIABILITY

In this case the Complainant, Region II of the Environmental Protection, charges Respondent, Flexabar Corporation ("Flexabar"), with failing to file, in a timely manner, its annual "Pesticide Report for Pesticide-Producing Establishments". The report was required to be filed by March 1, 1990. It was filed in July 1990. Complainant proposes that Flexabar be assessed a \$5,000 penalty.

Flexabar admits that the report was due March 1, 1990 but was not filed until July 1990. Flexabar says, however, that the late filing was excusable and that it should not be held liable and penalized.

The facts surrounding this matter are not in dispute. The parties have executed a written stipulation of facts dated June 24, 1993.

I granted the parties' request to take briefs and rule on the issue of liability. If liability is found, the parties have agreed to negotiate the amount of penalty, if any, to be paid.

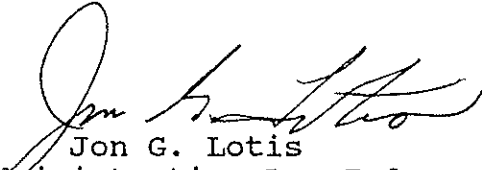
The principal facts bearing upon this issue are these: (1) although not required by statute, it was the practice of the EPA to mail blank report forms to registered pesticides establishments each year in advance of the March 1, deadline, (2) for all applicable years prior to 1990, Flexabar received the form from the EPA and returned it timely, (3) EPA mailed a blank form to Flexabar on October 19, 1989, (4) neither EPA nor Flexabar have any record that such report was received by Flexabar (4) in June 1990, EPA notified that Flexabar that it had not received Flexabar's annual report form (5) sometime in June 1990 EPA, as a matter of courtesy, provided Flexabar with another blank form and (6) Flexabar filed the annual report in July 1990.

Flexabar makes these arguments: (1) it was not significantly late in filing the report--it filed the report as soon as the blank form was received (2) there is no allegation that Flexabar engaged in any wrongdoing (3) there was no harm done by the late filing (4) there is no allegation that when the report was filed

that there was any change from the information submitted in prior years (5) Flexabar never received a notice or reminder with regard to its failure to file by March 1, 1990 (6) the failure of Flexabar to file was a direct result of the failure of Flexabar to receive the blank forms and (7) the penalty is excessive in light of the company's size, the circumstances surrounding its failure to file and the fact that no prior violations are alleged.

7 U.S.C. §136 (e)(c)(1) read in conjunction with 40 C.F.R. §167.85 requires that pesticides-producing establishments file an annual report on or before March 1 of each year providing certain information with respect to the preceding calendar year. The stipulated facts make clear that Flexabar failed to file the report as required by the statute and regulation. Accordingly, it is found liable. Compliance with the statute and regulations is not conditioned upon the regulated community receiving blank forms or reports from the EPA. Rather, the regulations place the burden on the regulated community by stating where blank forms may be obtained to comply with the reporting requirement. 40 C.F.R. §167.90(a).

While Flexabar is liable, the arguments it puts forth are appropriate for consideration in determining the level of penalty, if any, which should be assessed under the circumstances of this case.


Jon G. Lotis
Administrative Law Judge

Dated: September 28, 1993
Washington, D.C.

IN THE MATTER OF FLEXABAR CORPORATION, Respondent
Docket No. IF&R 456-C

CERTIFICATE OF SERVICE

I certify that the foregoing Order On Issue Liability, dated September 28, 1993, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

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Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region II
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Dated: September 28, 1993
Washington, D.C.